

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

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No. 729.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EVERETT E. VAN WERT.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF IOWA.

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FILED OCTOBER 2, 1913.

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a UNITED STATES OF AMERICA,  
*Northern District of Iowa, ss:*

Pleas before the District Court of the United States in and for the Northern District of Iowa, Eastern Division, at a term begun and held at Dubuque in said district on the 4th Tuesday of April, 1913, before Hon. Henry T. Reed, judge of the Northern District of Iowa.

UNITED STATES OF AMERICA	} No. 4167. Criminal.
<i>vs.</i>	
EVERETT E. VAN WERT.	

Be it remembered, That heretofore, to wit, on the 4th day of December, A. D. 1912, the following proceedings were had by said court in the foregoing entitled cause, as appears of record on page 14 of Record N, of said court, to wit:

1 UNITED STATES OF AMERICA	} No. 4167. Presentment, bill of indictment.
<i>vs.</i>	
EVERETT E. VAN WERT.	

Now, on this 4th day of December, 1912, the grand jury in and for the United States District Court in and for the Northern District of Iowa, heretofore duly empaneled, came into court and by their foreman presented to the court a true bill of indictment against Everett E. Van Wert, charging him with the crime of unlawfully and knowingly accepting a bribe offered to him in his official capacity as special deputy agent of the Department of Indian Affairs, committed within the jurisdiction of this court;

Whereupon on motion of H. J. Bone, special United States attorney,

It is ordered by the court that said bill of indictment be received and filed, thereupon the same was duly endorsed by the clerk as follows:

Presented in open court by the foreman of the grand jury in presence of said grand jury and filed by me this 4th day of December, 1912.

Said bill of indictment so received and filed is in words and figures following, to wit:

2 UNITED STATES OF AMERICA,  
*Eastern Division of the Northern District of Iowa, ss:*

In the District Court of the United States in and for the district aforesaid, at the December term thereof, A. D. 1912.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, in the court aforesaid, on their oath present and charge that on the 30th day of May, in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district

and within the jurisdiction of said court, Everett E. Van Wert was then and there a person acting for and in behalf of the United States in an official capacity, to wit, a deputy special officer for the suppression of the liquor traffic with and among Indians; under and by virtue of the authority of a department of the Government, to wit, the Department of the Interior of the United States, the said Everett E. Van Wert having been theretofore duly and legally appointed such deputy special officer by the Commissioner of Indian Affairs under and by virtue of the authority of the Secretary of the Interior.

That in the performance of his official functions as such deputy special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Everett E. Van Wert was then and there charged with the duty and called upon and required, among other things, to make recommendations to his said superior officer, the Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning all matters connected with the conviction and punishment of persons who should unlawfully sell liquor to Indians, or otherwise

3 violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of said commissioner, when called on so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by executive or judicial clemency in any particular case; and in all the said matters and in all matters relating thereto, to act without partiality or favor, and truthfully and without violating or betraying the confidence and trust reposed in him, the said Everett E. Van Wert.

That at the April term of said court, in the year 1909, in and for said district, the following named persons, to wit, Charles S. Parker, William Kascht, Peter Wagner, William Wagner, Carl J. White, Edward Westhoff, P. J. Goswiler, Leonard Krantz, and Jacob Guyer were each and all indicted for unlawfully selling liquor to Indians in violation of laws of the United States, and each and all of said persons, above named and indicted as aforesaid, entered a plea of guilty, at the December term in the year 1909 of said court, to the offences charged in said indictment, and each of said persons who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of sixty days.

That before any of the aforesaid sentences were enforced or executed, an application was made to the judge of the said court for a reduction of the sentences and for a suspension thereof or part thereof, and also it was stated on behalf of the said persons who had

pleaded guilty that an effort would be made to obtain a commutation of the said sentences by Executive action;

That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences  
4 or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs, and the United States attorney in the aforesaid district announced that he would not recommend a commutation or other Executive clemency unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs;

That then and there and during all the dates and times herein mentioned it was and long had been the settled usage and practice for the United States judges in determining upon sentences and upon the application for changes, reductions, or suspensions thereof to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted.

That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty, as aforesaid, an opportunity to apply to and obtain from the said Commissioner of Indian Affairs said recommendation to the said judge of a reduction or suspension of the said sentences or a part thereof, and a recommendation from the said United States attorney for a commutation of sentence or other executive clemency.

5 That then and there and at all the times herein mentioned the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law, of any proposed leniency or clemency in connection with the punishment of the persons found guilty of offences thereunder.

That then and there and while the said sentences were, as aforesaid, being held in abeyance one Willis N. Birdsall, who was then and

there and theretofore had been attorney for the persons who had pleaded guilty, as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences, or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other executive clemency of the said sentences, or a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs a recommendation to that effect to the said judge and said United States attorney; that then and there on the 30th day of May, 1910, the said Everett E. Van Wert, who was then and there, as he the said Willis N. Birdsall then and there well knew, a person acting for and on behalf of the United States in the said official function, as aforesaid, under and by authority of the

6 Department of the Interior of the United States, as aforesaid, did unlawfully, wilfully, corruptly, and feloniously accept and receive from the said Willis N. Birdsall the sum of seventy-five dollars, lawful money of the United States, with the intent to have influenced thereby his decision and action on a question, matter, cause, and proceeding then and there expected and intended soon to be pending before him, and then and there expected soon by law to be brought before him in his official capacity and in his place of trust and profit, to wit, that is to say, with intent that when applications should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him the said Everett E. Van Wert, either directly or through other subordinates of the said commissioner for information, report, advice, and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he the said Everett E. Van Wert should thereupon have his decision and action influenced by the receipt by him of the said sum of seventy-five dollars, so that he would falsely and without regard of truth, and contrary to his duty as a person acting on behalf of the United States in an official capacity under and by virtue of the Department of the Interior, mislead and misinform said Commissioner of Indian Affairs, either directly or through other subordinates of the said commissioner, that under the facts and circumstances officially known to him, the said Everett E. Van Wert, leniency and clemency ought to be granted to the said persons or any of them who had pleaded guilty, as aforesaid, and advise that the said commissioner should, in the interest of the enforcement of the

7 said laws for the suppression of the liquor traffic with and among Indians, recommend to the said judge or to the said United States attorney, or to the said Secretary of the Interior, or to the said Attorney General, or to the said President, that leniency and clemency should be granted to said persons who had, as aforesaid, pleaded guilty, or to some of them, so that they should not be

placed in prison, but the sentences should be changed and commuted to a fine without imprisonment; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) H. J. BONE,

*Special Assistant to the United States Attorney  
for the Northern District of Iowa.*

(Endorsed:) No. 4167. District Court of the United States, Eastern Division of the Northern District of Iowa. The United States vs. Everett E. Van Wert. Indictment. Accepting bribe. Sect. 117, Criminal Code. Penalty: Fine not more than three times the amount of money involved and imprisoned not more than three years. A true bill. (Signed) G. M. Bigelow, foreman. Presented in open court by the foreman of the grand jury in the presence of the grand jury, and filed by me this 4th day of December, 1912. A. J. Van Duzee, clerk. M. L. Norman, deputy.

8	THE UNITED STATES, PLAINTIFF, vs. EVERETT E. VAN WERT, DEFENDANT.	}	No. 4167. Demurrer to indictment.
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Comes now the defendant in the above-entitled action and demurs to the indictment returned by the grand jury herein upon the following grounds:

1st. That the facts stated and set forth in said indictment do not constitute any crime or offence under the Constitution and laws of the United States.

2nd. That the facts set forth in said indictment do not charge the defendant with the offense of accepting a bribe or any other offense whatsoever under the Constitution and laws of the United States.

3rd. That said indictment wholly fails to charge the defendant with any crime or offence whatsoever and wholly fails to set forth or allege any facts which constitute an offense or crime under the Constitution and laws of the United States in this, to wit:

I. That said indictment fails to charge, allege, or set forth that the said Everett E. Van Wert was an officer of the Government of the United States, or that he was a person acting for on behalf of the United States in an official function or that he was acting by authority of any department or office of the Government thereof, and that said indictment wholly fails to charge the defendant with receiving or accepting any money or other thing of value with intent to influence him while acting in any official function or under or by authority of any department or office of the Government.

9 II. That said indictment wholly fails to charge, allege, or set forth that any matter, question, cause, or proceeding was pending before the said defendant in his official function or before him as an officer of the United States, or as a person acting for or in behalf of the United States in any official function or as a person acting



under or by authority of any department or officer of the Government of the United States at the time of the alleged act of the defendant, which is charged as accepting a bribe in said indictment.

III. That said indictment fails to show, set forth, and charge that the receiving of the sum of \$75.00 by the defendant, as alleged in said indictment, was received by the defendant for the purpose of influencing his decision or action on any matter, question, cause, or proceeding which was at the time of the alleged payment, or might thereafter be pending or which had been by law brought before him in his official capacity or in his place of trust and profit and does not charge the said defendant with *with* receiving or accepting money or other thing of value with intent to influence him, to commit or aid in committing or to collude with others for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty or any act against the Constitution, laws of the United States, or the regulations of any department thereof, or against the practices or established usages of any department of the Government.

IV. That said indictment wholly fails to allege, set forth, or show any regulations of any department of the Government or of any settled practice or usage under which it was the custom, practice, or usage of any administrative or judicial officer of the Government to

10 consult defendant as to the reduction or suspension of any sentence or judgment or penalty imposed or rendered by any judge of the United States upon any person for the violation of the laws relating to the suppression of the sale of intoxicating liquors to and among the Indians, and wholly fails to allege, set forth, or charge that it was the duty of defendant under any existing regulation of any department of the Government or under any established practice and usage of any department of the Government set forth in said indictment, to advise or recommend to the Commissioner of Indian Affairs, to the Secretary of the Interior, to the Attorney General, to the President of the United States, to the United States attorney, or to any judge of the United States upon any person found guilty of violating the law relating to the suppression of the sale of intoxicating liquors among the Indians, and that such indictment wholly fails to say that in receiving the money alleged to have been paid defendant, said payment was received for the purposes and with intent to influence his decision in any matter which he was required to decide or which it was his duty to decide under the Constitution and laws of the United States or any regulation or established practice or usage of any department of the Government.

V. That said indictment wholly fails to allege, set forth, or show the violation of any act of Congress, rule or regulation of any department of the Government, the violation of which said law, rule, or regulation constitutes an offense against the Constitution and laws of the United States.

(Signed)

EVERETT E. VAN WERT,  
By S. C. HUBER, *His Atty.*

104 And on the 18th day of August, 1913, the following proceedings were had by said court in this case, as appears of record on page 191, of record N of said court, to-wit:

UNITED STATES OF AMERICA  
*vs.*  
 EVERETT E. VAN WERT. } No. 4167.

Now, on this 18th day of August, 1913, this cause comes before the court upon the demurrer of defendant to the indictment in said case, Harry J. Bone, Esq., special assistant United States attorney, appearing for the plaintiff, and S. C. Huber, Esq., appearing for the defendant, and argument of counsel having been heard and duly considered, the court sustains said demurrer; and

It is ordered by the court that said cause be, and is hereby, dismissed and that defendant go hence without day, and further that the bond given for the appearance of defendant be, and is hereby, discharged.

(The opinion covering the submission of the demurrer in this case is copied in the transcript of case No. 4164 and 4165 as consolidated, which transcript is forwarded to the Supreme Court at the same time the transcript in this is forwarded.)

11 And on the 17th day of September, 1913, the following assignment of errors and prayer for writ were filed in the office of the clerk of said court in words and figures following, to-wit:

In the District Court of the United States, in and for the Northern District of Iowa, Eastern Division.

UNITED STATES OF AMERICA  
*vs.*  
 EVERETT E. VAN WERT. } No. 4167. Assignment of errors.

Comes now the plaintiff in error, the United States of America, by its attorney, A. Van Wagenen, and submits that in the record, proceedings, decision, and final judgment of the District Court of the United States in and for said Northern District, Eastern Division, there is manifest error in this, to wit:

First. The court erred in rendering a decision in favor of the defendant and against the plaintiff in the above-entitled cause.

Second. The court erred in sustaining the demurrer to the indictment in the above-entitled cause.

Third. The court erred in dismissing the prosecution in the above-entitled cause.

Fourth. The court erred in holding that under the facts alleged in the indictment in the above-entitled cause there was no offense which had been committed by the defendant.

Fifth. The court erred in holding that under section 117 of the Penal Code and other criminal statutes relating to the acts charged, there was no offense which had been committed.

Sixth. The court erred in holding that the acts induced and intended to be induced by the payment of the bribe were not acts performed by the defendant in his official capacity and were not acts which when performed for a valuable consideration were such as constitute the offense alleged or any offense under the laws of the United States.

Seventh. The court erred in holding that under the facts alleged in the indictment no crime had been committed against the laws of the United States.

This assignment of errors is made as a part of and to be filed with a petition for a writ of error to the Supreme Court of the United States under the criminal appeals acts, and is filed in connection and with said petition for a writ of error and the petitioner prays that the above errors may be heard and decided upon an appeal to the Supreme Court, as prayed.

A. VAN WAGENEN,  
*United States Attorney.*  
GROVER M. NEESE,  
*Ass't U. S. Atty.*

Filed September 17, 1913. Lee McNeely, clerk.

13 United States District Court, Northern District of Iowa,  
Eastern Division.

UNITED STATES OF AMERICA,	} No. 4167.
<i>vs.</i>	
EVERETT E. VAN WERT.	

*Petition for writ of error.*

To the Hon. HENRY T. REED,  
*Judge of the United States District Court*  
*for the Northern District of Iowa.*

Your petitioner, United States of America, by its attorney, A. Van Wagenen, attorney for United States in and for Northern District of Iowa, represents that on the 4th day of December, 1912, an indictment was returned against the defendant in the above-entitled cause, and upon the 23rd day of April, 1913, the defendant filed thereto a demurrer; that on the 13th day of May, 1913, said demurrer was argued before his honor, Henry T. Reed, presiding, and was thereupon submitted and taken under advisement by the said judge, that afterwards, to-wit, on August 18, 1913, the said court, Henry T. Reed, presiding, entered a decree sustaining the demurrer to said indictment, and this plaintiff holds there is manifest error in the aforesaid decree in that the court erred in holding that the acts alleged in the indict-

ment did not constitute any crime under the laws of the United States; all of which is more specifically set out in an assignment of errors filed herewith and made a part of this petition.

Your petitioner further shows that the decision rendered as aforesaid in effect hold that secs. 117 of the Penal Code, and other laws relating to acts charged in the indictment are invalid, and the said decision also involved the construction of said sec. 117, of the

14 Penal Code of the United States, and a construction of the laws of the United States relating to acts such as are charged as a violation, in said indictment.

Wherefore in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause to the honorable Supreme Court of the United States, and that proper order touching the security required, if any, may be made.

A. VAN WAGENEN,  
United States Attorney.  
Per GROVER M. NEESE,  
Assistant U. S. Attorney.

Allowed to operate as a supersedeas this 17th day of September, 1913.

HENRY T. REED,  
U. S. District Judge, Northern District of Iowa.

Filed September 17, 1913. Lee McNeely, clerk.

15 And on the 17th day of September, 1913, the following order was entered of record on page 201 of minutes N of said court, to wit:

UNITED STATES OF AMERICA	} No. 4167.
<i>vs.</i>	
EVERETT E. VAN WERT.	

Now this 17th day of September, 1913, comes the plaintiff in the above-entitled cause, and presents to the court its petition praying for allowance of a writ of error intended to be urged by it, and the proper transcript of the record and papers and proceedings upon which judgment has been rendered duly authenticated, may be sent to the United States Supreme Court, and that such order or other proceeding may be had as may be proper in the premises, and in consideration thereof the court being fully advised in the premises, and in consideration thereof the court being fully advised in the premises.

It is ordered that the writ of error in the above-entitled cause issue as prayed for in the petition, the same to act as a supersedeas without bond on part of the United States.

## 16 UNITED STATES OF AMERICA, ss:

*The President of the United States, to the honorable the judges of the District Court of the United States for the Eastern Division of the Northern Judicial District of Iowa, greeting:*

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the April term, 1913, thereof, between the United States of America, plaintiffs, and Everett E. Van Wert, defendant, No. 4167, a manifest error hath happened, to the great damage of the said United States of America, plaintiffs, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, and filed in the office of the clerk of the Supreme Court of the United States, on or before the 17th day of October, 1913, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand nine hundred and thirteen.

Issued at office in the city of Dubuque with the seal of the District Court of the United States for the Eastern Division of the Northern District of Iowa, dated as aforesaid.

[SEAL.]

LEE MCNEELY,

*Clerk District Court United States, Eastern  
Division of the Northern District of Iowa.*

Allowed by—

HENRY T. REED,

*United States District Judge, Northern District of Iowa.*

## UNITED STATES OF AMERICA,

— *Division of the Northern District of Iowa, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court at office in the city of Dubuque, Iowa, this 26th day of September, A. D. 1913.

[SEAL.]

LEE MCNEELY,  
*Clerk of said Court.*

(Indorsed:) No. 4167. United States District Court, Eastern Division of the Northern District of Iowa. United States of America vs. Everett E. Van Wert. Writ of error to the Circuit Court of the United States for the Eastern Division of the Northern Judicial District of Iowa. Filed 17th day of September, 1913. Lee McNeely, clerk.

18

*Citation.*

*The United States of America to Everett E. Van Wert, greeting:*

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Eastern Division of the Northern District of Iowa, wherein the United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Henry T. Reed, judge of the District Court of the United States for the Northern District of Iowa, this 17th day of September, in the year of our Lord one thousand nine hundred and thirteen.

HENRY T. REED,  
*United States District Judge for the  
Northern District of Iowa.*

19 Due and legal service of the within citation is hereby accepted at Tama, Tama County, Iowa, on this 25th day of September, 1913.

EVERETT E. VAN WERT,  
By S. C. HUBER, *His Atty.*

(Indorsed:) No. 4167. United States District Court, Eastern Division of the Northern District of Iowa. United States vs. Everett E. Van Wert. Citation. Filed 26th day of September, 1913. Lee McNeely, clerk.

20 UNITED STATES OF AMERICA,  
*Northern District of Iowa, ss:*

I, Lee McNeely, clerk of the District Court of the United States in and for the Northern District of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of United States, plaintiff, vs. Everett E. Van Wert, No. 4167, criminal, as fully as the same remain on file and of record in my office as such clerk.

I further certify that the writ of error which is hereto attached was served and filed in my office at Dubuque on the 17th day of September,

ber, A. D. 1913, and a copy thereof at the same time lodged in my office, and I now return the said writ of error, and annexed thereto and hereto attached an authenticated copy of the record in the case mentioned in said writ of error, and the citation and proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in said district this 26 day of September, 1913.

[SEAL.]

LEE MCNEELY,  
*Clerk United States District Court,  
Northern District of Iowa.*

(Indorsement on cover:) File No. 23880. N. Iowa, D. C. U. S. Term No. 729. The United States, plaintiff in error, vs. Everett E. Van Wert. Filed October 2d, 1913. File No. 23880.



IN COMPLIANCE WITH THE ACTS OF THE UNITED STATES FOR THE  
RECOVERY OF DEBTORS' ASSETS

NOTICE TO THE UNITED STATES TO ADVANCE

RECEIVED BY THE UNITED STATES TO ADVANCE



# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

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THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 727.
v.	
WILLIS N. BIRDSALL.	

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 728.
v.	
THOMAS E. BRENTS.	

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 729.
v.	
EVERETT E. VANWERT.	

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.*

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## MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, respectfully moves this court to advance the above-entitled causes to be heard together.

These are prosecutions under sections 39 and 117 of the Criminal Code, and present the question whether the giving of money to one acting for and in behalf of the United States in an official capacity, or the acceptance of money by such person, to influence

his conduct upon a matter to be brought before him according to the regulations of the Department under which he was appointed, but not directly by any statute of the United States, constitutes the giving or acceptance of a bribe within the meaning of these sections.

In the *Birdsall* case there are two indictments charging the defendant with offering bribes to VanWert and Brents, special officers appointed by the Interior Department for the suppression of the liquor traffic with the Indians. The alleged purpose was to influence their advice to the Commissioner of Indian Affairs in regard to extending clemency to certain persons under sentence for unlawfully selling liquor to Indians when the Commissioner, according to the regulations of the Interior Department, should refer such matter to those officers for action. The Commissioner's recommendation therein, by the accepted practice, would be the basis for the extension or denial of executive or judicial clemency. (R. in No. 727, pp. 1-15.)

The indictments in the Brents and VanWert cases charge the acceptance of these bribes. (R. in No. 728, pp. 1-4; R. in No. 729, pp. 1-5.)

These indictments were demurred to, and the court sustained the demurrers on the ground that since there was no act of Congress conferring upon the Interior Department any duty in regard to recommending to the executive and judicial departments of the Government the extension or withholding of clemency for persons convicted of selling

liquor to Indians, no offense against the United States was alleged. (R. in No. 727, pp. 22-26, 31, 32.)

The cases are brought here by the United States under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, for a review of this construction of sections 39 and 117 of the Criminal Code.

Notice of this motion has been given opposing counsel.

JOHN W. DAVIS,  
*Solicitor General.*

OCTOBER, 1913.

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